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Supreme Court of the United States

October Term, 1977

No. 77-1530

ALVIN E. HARBIN,
Petitioner,

vs.

THE INTERLAKE STEAMSHIP COMPANY,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF OF THE INTERLAKE STEAMSHIP COMPANY, RESPONDENT, IN OPPOSITION TO PETITION FOR CERTIORARI

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May 24, 1978

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OPINION

The Opinion of the United States Court of Appeals for the Sixth Circuit by Circuit Judges Weick and Celebrezze and District Judge Gray is reported in 570 F.2d 99.

QUESTIONS PRESENTED

The statement by Petitioner Harbin of the questions presented is unacceptable. The questions the case presents are:

1. Whether on its facts this case of an assault on shipboard would justify a determination that the vessel was unseaworthy—or whether, as the court below held, the proof failed to show the assailant was of the "savage and vicious nature" the law demands before the vessel may be adjudged unseaworthy.

2. Whether it is, as the court below held, misconduct for counsel for Petitioner Seaman Harbin to argue no one "has been called to say that he [Harbin] is a bad actor" and that if there were such evidence Respondent "Interlake would have brought witnesses from all over", after successfully excluding from the evidence proof that Harbin had been convicted of armed robbery and of a Dyer Act violation and after excluding evidence of Petitioner Harbin's "chronic alcoholism, his tendency to become 'pretty wild' when drinking, and his drinking on the evening of the incidents" (A 14) for which he sues Respondent Interlake.

NO STATUTE IS INVOLVED

Petitioner Harbin erroneously says the Jones Act, 46 U.S.C. §688, is involved. A Jones Act claim was included in the complaint, but Petitioner abandoned that claim.

STATEMENT OF THE CASE

The case presents a factual question only. The Court of Appeals correctly pointed out:

> "The truth is that the evidence did not support the allegations of the complaint that Highberg was of 'malicious and savage nature' and 'was an incompetent crew member by reason of his savage and vicious nature.' The uncontroverted evidence was to the effect that the time served by Highberg at sea was from twenty-five to twenty-six years, and that there had never been a complaint about his conduct. He had been licensed as a ship's officer by the United States Coast Guard for about twenty years, and had worked for Interlake for about three years. There was not an iota of evidence that he had a malicious, vicious and savage disposition. He was highly regarded by the men whom he supervised. He was never known to lose his temper or to raise his voice." A4

Moreover,

> "There was no evidence of any prior enmity between Harbin and Highberg." A4

THERE IS NO REASON TO GRANT THE WRIT

A factual question only arises on this record.

That question is whether on its facts this case falls on the side of the *Boudoin v. Lykes Brothers Steamship Co., Inc.* (1955), 348 U.S. 336, line of "wicked disposition, a perversity to evil conduct, a savage and vicious nature" that justifies a determination that the vessel was unseaworthy, or whether it falls on the other side of that line as in the opinion of Judge Learned Hand in *Jones v. Lykes Brothers Steamship Co., Inc.,* (2d Cir.) 204 F.2d 815, *cert. denied* (1953), 346 U.S. 857, *reh. denied,* 346 U.S. 905 and 348 U.S. 960, which this Court approved in *Boudoin.*

The Court of Appeals held the latter.

Other Courts of Appeals likewise have correctly applied that test:

Connolly v. Farrell Lines, Inc. (1st Cir., 1959), 268 F.2d 653, *cert. denied* (1959), 361 U.S. 902;

Walters v. Moore-McCormack Lines, Inc. (2nd Cir., 1962), 309 F.2d 191;

Stankiewicz v. United Fruit Steamship Corporation (2d Cir., 1956), 229 F.2d 580.

There is no conflict in the circuits.

The conflict is only among the facts of the cases that have come before the courts. The *Boudoin* test has been applied in these cases on the basis of their facts and each adjudged to fall on the one side or the other of the *Boudoin* line.

CONCLUSION

The writ should be denied.

Respectfully submitted,

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